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IN THE

# SUPREME COURT OF THE UNITED STATES

ON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

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BETER WILSON,

Plaintiff in Error,

vs.

REPUBLIC IRON AND STEEL COMPANY, A BODY CORPORATE, AND WARNER STINSON,

Defendants in Error.

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## BRIEF OF PLAINTIFF IN ERROR.

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BRIEF OF PLAINTIFF IN ERROR.

W. A. DENSON, Birmingham, Ala.,

Attorney for Plaintiff in Error.

## STATEMENT OF CASE.

Beter Wilson, plaintiff in error, was, at the time of the injuries complained of, an employee of the defendant in error, Republic Iron and Steel Company. The negligence of Warner Stinson, a co-employee, in authority over plaintiff in error, proximately caused the injuries complained of, and for this, and the additional reason of preventing removal of the cause to the Federal Court, plaintiff in error made said Warner Stinson one of the parties defendant to the cause of action. The defendant in error, Republic Iron and Steel Company, filed a petition and bond in the Circuit Court of Jefferson County, where said suit was instituted and was pending, seeking to remove the cause to the United States District Court for the Southern Division of the Northern District of Alabama. The petition alleged fraudulent joinder and separable controversy as grounds for removal. Because of the allegations of fraudulent joinder the State Court knowing such issue could be tried only in the Federal Court, granted the petition and the cause was removed. Thereafter when the cause was reached for trial in the Federal Court the plaintiff in error appearing solely for that purpose and without waiving the question of jurisdiction filed a motion to remand the cause to the State Court, denying that there was any fraudulent joinder, insisting that the complaint alleged a joint cause of action, that the cause had been improperly removed, and for that reason the Federal Court was without jurisdiction to proceed. There was no fraudulent joinder, neither was there any evidence of any, and for the sole reason that the complaint, in the opinion of the Federal Court, alleged a separable controversy and failed to state a joint cause of action, the Federal Court overruled the motion to remand of the plaintiff in error and endeavored to retain jurisdiction of the cause, making an order therein requiring the plaintiff in error to pay the costs of a former

suit within a certain time or the cause to stand dismissed. Within three months from the time the order of dismissal was entered and made final, plaintiff in error sued out a writ of error to this Court and at the same term at which the final judgment of dismissal was entered he obtained a certificate of the trial judge that the question of jurisdiction is the only question presented by the record in this cause to be reviewed by this Court.

## SPECIFICATIONS OF ERRORS RELIED UPON.

The errors committed by the trial court and relied upon by plaintiff in error to reverse this cause are:

First—The order of the trial court overruling plaintiff's motion to remand the cause to the State Court.

Second—The order of the trial court requiring plaintiff to pay costs of former suit.

Third—The order of the trial court dismissing the cause for failure of plaintiff to pay costs of former suit.

## ARGUMENT.

The resident defendant, Warner Stinson, was properly joined as a party defendant with the non-resident defendant, Republic Iron and Steel Company.

**L. & N. R. R. Co. vs. Abernathy,** 197 Ala. 516-535, and authorities there cited.

**Charman vs. Lake Erie & W. R. Co.,** 105 Fed. 449.

**Republic Iron & Steel Co. vs. Lee,** 227 Ill. 246; 81 N. E. 411.

**Coalgate Co. vs. Brass,** 25 Okla. 244.

**Lake Erie & W. R. Co. vs. Charman,** 161 Ind. 95; 67 N. E. 923.

**Mayberry vs. Northern P. R. R. Co.,** 100 Minn. 79; 12 L. R. A. (N. S.) 675; 10 Ann. Cases 754.

The mere fact that a Federal Court has held to the contrary, as in the case of **Warax vs. Cin., N. O. & T. P. R. Co.**, 72 Fed. 637, is not at all conclusive of the right of removal. The Supreme Court of the United States has held that this is a question of State law and that it would not go behind the decision of the highest court of the State.

**Chicago, R. I. & P. R. Co. vs. Schwyhart**, 227 U. S. 193; 57 L. E. 477.

Even though it could be successfully contended on special demurrer that the complaint failed to allege a cause of action against the resident defendant, Stinson, this would not constitute ground for removal.

**Chicago, R. I. & P. R. Co. vs. Schwyhart**, 227 U. S. 194; 57 L. E. 478.

Whether there was a joint liability or not, was a question to be determined upon the averments of the plaintiff's statement of his cause of action, and is a question for the State Court to decide. In no event could it constitute ground for removal.

**Chicago, R. I. & P. R. Co. vs. Dowell**, 229 U. S. 113; 57 L. E. 1095-1096.

The mere fact that the defendant Republic Iron and Steel Company was liable by virtue of the employee's liability statutes of Alabama and the defendant Stinson was liable at common law presented no ground for removal.

**Chicago, R. I. & P. R. Co. vs. Dowell**, 229 U. S. 113; 57 L. E. 1096.

**So. Ry. Co. vs. Miller, 217 U. S.** 215-216, 54 L. E. 736.

The fact that a prior suit had been brought in the State Court against the non-resident defendant solely and subsequently dismissed in the Federal Court, after removal thereto, has been held by this Court to present no ground whatever for removal.

**So. Ry. Co. vs. Miller, 217 U. S.** 216-217; 54 L. E. 736.

The allegation in the petition that the defendant Stinson was a pauper and the responsibility of the non-resident defendant unquestioned affords no ground of removal.

**Chicago, R. I. & P. R. Co. vs. Dowell,** 229 U. S. 113-114; 57 L. E. 1096.

The allegation of the petition that it was the intent and purpose of the plaintiff in joining the resident defendant Warner Stinson, to prevent the removal of the cause to the Federal Court, affords no ground for removal.

**Chicago, R. I. & P. R.. Co. vs. Schwyhart,** 227 U. S. 193; 57 L. E. 477-478.

**Chicago, R. I. & P. R. Co. vs. Whiteaker,** 239 U. S. 424-425; 60 L. E. 364.

The allegations of fraudulent joinder in the petition amount to no more than a traverse of the cause of action set forth in the complaint. Under the allegation of the complaint the non-resident defendant could only be liable provided the resident defendant was guilty as charged. hence the allegation of the petition denying Warner Stinson's participation as alleged in the complaint manifestly go to the merits of the action in its entirety, and not to the joinder; that is to say, it indicates that the plaintiff's case is ill founded as to all of the defendants.

**Chicago, R. I. & P. R. Co. vs. Whiteaker,** 239 U. S. 425; 60 L. E. 364.

The allegation of the petition, that the cause of action existing between plaintiff and petitioner is separable and can be properly tried and adjudicated without the presence of any other party defendant, is without any merit to afford ground of removal. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. It is recognized that the plaintiff may select his own manner of bringing his action, and must stand or fall by his election. If he has improperly joined causes of action, he may fail in his suit; the question may be raised by answer and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal. The plaintiff may elect his own method of attack, and the case which he makes in his complaint, being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal. The fact that the plaintiff may have misconceived his cause of action and has no right to prosecute the defendants jointly does not render the controversy separable within the meaning of the Act of Congress.

**Chicago, R. I. & P. R. Co. vs. Willard,** 220 U. S. 425-427, 55 L. E. 526-527.

There was no evidence introduced upon the trial of the motion and the bill of exceptions so states. The bill of exceptions also states that the trial court overruled the motion solely upon the record and no other evidence. There was no attempt made by the defendant to prove the allegations of the petition in respect to fraudulent joinder. Such allegation must not only be made in the petition but must also be proven in order to be of any

avail to the party making them. Not only were the allegations of fraudulent joinder insufficient as shown by the above authorities but there was also no attempt made to prove the allegations as made.

**L. & N. R. R. Co. vs. Wangelin,** 132 U. S. 599-603, 33 L. E. 476-477.

**Chesapeake & O. R. Co. vs. Cockrell,** 232 U. S. 153-154, 58 L. E. 547-548.

**Plymouth Con. Gold Min. Co. vs. Amador, Etc. Canal Co.,** 118 U. S. 264-271, 30 L. E. 234.

It is respectfully submitted the judgment of the trial court dismissing the plaintiff's cause of action should be reversed and held for naught and said court be instructed by this Court to remand said cause to the State Court from which it has been wrongfully removed by the defendant in error and that all costs of this appeal should be taxed against said defendant and the plaintiff in error be allowed such damages for such wrongful removal as has been imposed upon him and incurred by him in defending said wrongful removal and also for the delay in the prosecution of the cause produced by said wrongful removal of the cause from the State Court.

Respectfully submitted,

W. A. Dinsmore,

Att'y. for Pl'ff. in Error.

I hereby certify I have heretofore served upon counsel for the defendant in error copies of the foregoing brief and argment.

W. A. Dinsmore,

Att'y. for Pl'ff. in Error.